

Exhibit A

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ESTATE OF YONADAV HIRSHFELD,
et al.,

Plaintiffs,

v.

18 Civ. 1982 (KPF)

THE BANK OF CHINA LIMITED,

Defendant.

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New York, N.Y.
August 9, 2019
12:00 p.m.

Before:

HON. KATHERINE POLK FAILLA

District Judge

APPEARANCES (via telephone)

LAW OFFICES OF PAUL G. GASTON
Attorneys for Plaintiffs
BY: PAUL G. GASTON

SCHER & SCHER P.C.
Attorneys for Plaintiffs
BY: DANIEL J. SCHER

DORSEY & WHITNEY LLP
Attorneys for Defendant
BY: LANIER SAPERSTEIN
JOSHUA KORNFIELD
MARK SULLIVAN
SHAN JIANG

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(In open court)

THE COURT: Counsel, good afternoon. This is Judge Failla. I thank you very much for participating in this call by phone. Please state your appearances.

MR. GASTON: Good afternoon, your Honor. This is Paul Gaston on behalf of plaintiffs. And Mr. Perlin regrets he cannot join us today because it's already Friday night in Israel, and he did not want to ask for another continuance, so I will be handling the conference with Mr. Scher.

MR. SCHER: Mr. Scher is on the line also for the plaintiff. Dan Scher.

THE COURT: Yes. And welcome to you both. I certainly understand did Mr. Perlin, and we understand and that's fine. My expectation, gentlemen, is I will be presenting my opinion, but I don't know that I would have much in the way of colloquy with the parties.

Representing Bank of China, may I have appearances, please.

MR. SAPERSTEIN: This is Lanier Saperstein on behalf of Bank of China from Dorsey & Whitney. I have three of my colleagues with me: Mr. Mark Sullivan, Josh Kornfield and Shan Jiang.

THE COURT: OK. Welcome to all of you, and thank you very much.

All right. Let me then please begin. And let me

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1 begin by not apologizing but recognizing that there are more
2 exciting things to do than listen to a judge read into the
3 record a decision, but I want to give you a decision at the
4 earliest opportunity I had, and I didn't want to trouble you
5 all to come in here just to hear me read it, so I appreciate
6 your accommodations in that regard.

7 And I also wanted you to know -- and I am sure you all
8 know -- that the Second Circuit issued a decision yesterday --
9 I don't have a number for the case other than the name is
10 Siegel v. HSBC Bank -- upholding a decision of Judge Cote's. I
11 believe that there are some similarities and some differences,
12 but to the extent you wanted to make me aware of a very
13 recently issued decision in this area, I wanted you to know
14 that I am aware of a recently issued decision in this area.
15 So, I'll just put that to the side for a moment.

16 Our conference this afternoon is for me to render an
17 oral decision on defendant's motion for judgment on the
18 pleadings, and I will just cut to the chase and explain, for
19 the reasons I'm about to address, I am denying the motion.

20 I do want to make clear that I found both side's
21 materials, but particularly the defense's materials and oral
22 presentation, to be excellent, and so I imagine that's cold
23 comfort to you given the result I'm about to give, but really
24 it was very good and made me think a lot.

25 The issue, the way I see it -- and I think this will

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1 be reflected at various points in my decision -- is that both
2 sides are very well versed in this area of the law, and I think
3 as a result the defense is able to call to my attention so many
4 cases that touch on these areas of the law. And the
5 plaintiffs, through their very experienced counsel, are able to
6 submit pleadings that address -- within the bounds of Rule 11
7 of course -- each of the issues that have been raised in these
8 cases.

9 So, I find ultimately that the plaintiffs have, if you
10 will, threaded the needle necessary to have this case survive a
11 motion for judgment on the pleadings.

12 You are all familiar with the allegations of the
13 amended complaint, so to keep you from remaining on this call
14 forever, I'm not giving a full recitation of the facts. I will
15 be addressing the procedural history only as necessary.

16 Although this decision touches on all of the issues
17 raised by the parties, I'm discussing some in greater depth
18 than others. I will briefly resolve the issues regarding the
19 political question and Totten doctrines, and devote more of my
20 time to the personal jurisdiction arguments and as well the
21 arguments for primary and secondary liability under the ATA and
22 JASTA. If there is a point on any of these issues that hasn't
23 been addressed fully, I promise you that it has been
24 considered, and I am not going to get to that level of
25 granularity in resolving this motion at this stage.

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1 I will speak very briefly, because again you all are
2 very well aware of the law in this area, but a motion for a
3 judgment on the pleadings is subject to the same standards as a
4 motion to dismiss under Federal Rule of Civil Procedure
5 12(b)(6). There are so many cases for that proposition; I will
6 give you one: *Bank of New York v. First Millennium, Inc.*, 607
7 F.3d 905 (2d Cir. 2010). And in this setting I am to "draw all
8 reasonable inferences in the non-moving party's favor, assume
9 all well-pleaded factual allegations to be true, and determine
10 whether they plausibly give rise to an entitlement to relief."
11 I am quoting there from *Faber v. Metropolitan Life Insurance*
12 *Company*, 648 F.3d 98, 104 (2d Cir. 2011). "To survive a motion
13 to dismiss, a pleading must contain sufficient factual matter,
14 accepted as true, to 'state a claim to relief that is plausible
15 on its face.'" I will just say *Ashcroft v. Iqbal* and *Bell*
16 *Atlantic Corporation v. Twombly*, I'm confident everyone on this
17 call is aware of those cases. "While *Twombly* does not require
18 heightened fact pleading of specifics, it does require enough
19 facts to 'nudge a non-moving party's claims across the line
20 from conceivable to plausible.'" "Where a pleading alleges
21 facts that are merely consistent with liability, it stops short
22 of the line between possibility and plausibility of entitlement
23 to relief." That said, I am not to accept legal conclusions or
24 threadbare recitals or conclusory statements. Those do not
25 suffice.

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1 Let me turn, please, to the political question
2 doctrine. "Prominent on the surface of any case held to
3 involve a political question is found, one, a textually
4 demonstrable constitutional commitment of the issue to a
5 coordinate political department; or, two, a lack of judicially
6 discoverable and manageable standards for resolving it; or,
7 three, the impossibility of deciding without an initial policy
8 determination of a kind clearly for nonjudicial discretion; or,
9 four, the impossibility of a court's undertaking independent
10 resolution without expressing lack of the respect due
11 coordinate branches of the government; or, five, an unusual
12 need for unquestioning adherence to a political decision
13 already made; or, six, the potentiality of embarrassment from
14 multifarious pronouncements by various departments on one
15 question." And that is a long quote from *Baker v. Carr*, 369
16 U.S. 186, a Supreme Court decision from 1962.

17 Defendant here argues that this case should be
18 dismissed primarily under the second, but also under the first,
19 fourth and sixth *Baker* factors, and principally defendant
20 argues that the instant action is nonjusticiable because
21 plaintiffs do not have the power or ability to compel the
22 production of evidence -- namely from Israel or the People's
23 Republic of China -- that would be necessary to support the
24 core claims in this case.

25 I want to be clear -- and that's why I'm reading this

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1 statement -- to be sure, in the related lawsuits, as the
2 parties have defined them, plaintiffs were unable to obtain the
3 necessary evidentiary cooperation from Israel and the PRC, but
4 I cannot automatically discredit plaintiffs' arguments that the
5 passage of time may have altered the landscape or that similar
6 evidence might be available from third parties. At the very
7 least, I cannot definitively decide this issue until I am
8 presented with a discovery dispute or told myself about
9 Israel's or the PRC's unwillingness to cooperate, and,
10 accordingly, the motion to dismiss under the political question
11 doctrine is denied.

12 Turning to the Totten doctrine, which was set forth
13 initially in *Totten v. United States*, 92 U.S. 105, from 1875,
14 and expanded upon by *Tenet v. Doe*, 544 U.S. 1, in 2005, I have
15 been asked by the defense to apply the Totten rule to bar
16 plaintiffs' claims, all of which defendant claims are
17 impossible to litigate without improperly disclosing classified
18 information.

19 At the moment, I find the instant case to be too
20 tenuous a connection to the ideas and the policy goals of
21 *Totten* or *Tenant*. While *Totten* concerned a contract dispute
22 between a U.S. spy and the federal government, the instant
23 matter involves Bank of China's support of Hamas. Here, the
24 very subject matter of the action is not a state secret. Even
25 if it were, the Court is not convinced that it is required to

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1 expand *Totten* to cases involving state secrets of foreign
2 states. And for this reason the motion to dismiss under the
3 *Totten* doctrine is denied.

4 I'm going to spend a little bit more time on this
5 issue of personal jurisdiction. The parties do not dispute
6 that Bank of China is not subject to general jurisdiction, and
7 so we're really focusing on specific jurisdiction in this case.
8 And in the framework of specific jurisdiction, I may exercise
9 personal jurisdiction over a defendant if it has been properly
10 served, if I have a statutory basis for exercising personal
11 jurisdiction, and if the exercise of personal jurisdiction
12 comports with constitutional due process. I am citing here to
13 *Licci v. Lebanese Canadian Bank*, 673 F.3d 50 (2d Cir). And the
14 parties are disputing whether under Federal Rule of Civil
15 Procedure 4(k)(1)(A), personal jurisdiction lies under New York
16 CPLR 302(a)(1), which is the New York long arm statute relating
17 to non-domiciliaries that transact business in New York. To
18 establish personal jurisdiction under this provision, the
19 defendant must have transacted business within the state and
20 the claim asserted must have arisen from that business
21 activity.

22 The crux of the issue in this regard is the role
23 played by a correspondent bank, more precisely whether Bank of
24 China's use of a correspondent account in New York to send
25 money from Iran to a Bank of China account in China meets the

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1 requirements of New York's long arm statute.

2 In the complaint plaintiffs allege that "Bank of China
3 repeatedly used its New York branch office to transfer or aid
4 in the transfer of substantial sums of money to, from, and on
5 behalf of Hamas, Iran, and others to enable Hamas to carry out
6 its terrorist activities, including the terrorist shooting."

7 Conversely, defendant argues that Bank of China merely
8 maintained a correspondent account in New York, which is
9 insufficient in and of itself to confer jurisdiction under CPLR
10 302(a)(1). And for the reasons that follow, I find that
11 plaintiffs have sufficiently pleaded the requirements of New
12 York's long arm statute.

13 Now, as a threshold matter, I agree with the defendant
14 that the use of a correspondent bank account isn't *per se*
15 jurisdictional -- I am citing here to *Amigo Foods Corporation*
16 *v. Marine Midland Bank of New York*, 39 N.Y.2d 391, a Court of
17 Appeals New York decision from 1976 -- and, rather, the key
18 jurisdictional inquiry relates to the frequency and the
19 deliberate nature of the defendant's role in these
20 transactions. And that is another *Licci* decision, this one
21 from New York State Court, 20 N.Y.3d 327 (2012). The most
22 recent cases on this issue in New York courts would be this
23 third *Licci* decision and *Al Rushaid v. Pictet & Cie*, 28 N.Y.3d
24 316 (2016), which focus my attention on several factors
25 including the number of transfers, by whom the transfers were

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1 initiated, through what banks, and the degree to which the
2 correspondent bank was aware of and permitted rather than
3 rejected the transfers.

4 Now, considering Bank of China's activities in light
5 of these factors, I find that defendant's correspondent banking
6 activity, as pleaded, is sufficient to establish a purposeful
7 course of dealing constituting the transaction of business in
8 New York under CPLR Section 302(a)(1). As alleged in the
9 operative complaint, Bank of China conducted dozens of wire
10 transfers for Hamas, totaling millions of dollars and,
11 according to plaintiffs, these dollar transfers were initiated
12 by Hamas and Iranian officials in Iran, Syria and other Middle
13 Eastern countries, and they were executed by and through Bank
14 of China's branches in the United States. The operative
15 complaint further asserts that Bank of China had a policy of
16 turning a blind eye to its customers' involvement in terrorism,
17 going so far as to advise its customers as to how it might
18 conceal the nature and identity of their U.S. banking
19 transactions. I am accepting -- as I must at this stage -- the
20 well-pleaded but nonconclusory allegations in the operative
21 complaint as true, and I find that those allegations suffice to
22 give the Court personal jurisdiction over Bank of China.

23 Defendants argue that Bank of China did not have an
24 active role in the correspondent banking process because the
25 transfers were initiated by customers at Middle Eastern banks,

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1 and I find that ultimately to be unavailing, because I believe
2 this argument ignores the fact that while Bank of China
3 allegedly provided banking services to Hamas, it was Hamas
4 itself who was sending the money and therefore initiating the
5 transfers, not Bank of China. Quoting from *Al Rushaid*, "A
6 foreign bank with a correspondent account that repeatedly
7 approves deposits and the movement of funds through that
8 account for the benefit of its customer is no less 'transacting
9 business in New York' because the customer, or a third party at
10 the customer's direction, actually deposits or transfers the
11 funds to New York." That quote is from 28 N.Y.3d at 328.
12 Here, as in *Licci* and *Al Rushaid*, the quantity and quality of
13 the alleged contacts, as pleaded in the complaint, establish a
14 course of dealing with New York, and the transaction and claim
15 are not merely coincidental.

16 Plaintiffs have made a *prima facie* showing of personal
17 jurisdiction pursuant to New York's long arm statute, and
18 precisely for this reason I am not addressing plaintiffs'
19 proffered alternative bases for personal jurisdiction,
20 including New York corporations law, the New York banking law
21 and Federal Rules of Civil Procedure 4(k)(1)(C) and 4(k)(2),
22 and I am denying the motion to dismiss for lack of personal
23 jurisdiction.

24 I am now addressing the issues of primary and
25 secondary liability under the ATA and JASTA, and I am denying

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1 defendant's motion on these bases as well. But I will note, as
2 I suggested at the beginning of this decision, I'm at the
3 motion for the judgment on the pleadings stage, and I am
4 obligated, based on the cases that I have read to you earlier,
5 to accept the well-pleaded allegations of the operative
6 complaint.

7 Letting this case go forward, I am saying nothing
8 about my view of the strength of the allegations or the likely
9 disposition in a summary judgment motion. And for this reason,
10 and given how I am bound to accept the well-pleaded
11 allegations, I am addressing these arguments somewhat briefly.

12 The ATA defines the term "international terrorism" as
13 activities that: A, involve violent acts or acts dangerous to
14 human life that are a violation of the criminal laws of the
15 United States or of any state, or that would be a criminal
16 violation if committed within the jurisdiction of the United
17 States or of any State; B, appear to be intended (i) to
18 intimidate or coerce a civilian population; (ii) to influence
19 the policy of a government by intimidation or coercion; or
20 (iii) to affect the conduct of a government by mass
21 destruction, assassination or kidnapping; and, C, occur
22 primarily outside the territorial jurisdiction of the United
23 States.

24 And with regards to primary liability, defendant's
25 first argument is that plaintiffs do not allege an act of

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1 international terrorism because Bank of China's routine banking
2 services were neither violent nor life endangering. Now,
3 although the provision of material support is not a *per se*
4 violation of the ATA, it can satisfy the violent acts or
5 dangerous to human life prongs of the ATA. And that is *Lind v.*
6 *Arab Bank, PLC*, 882 F.3d 314 (2d Cir. 2018). And here I find
7 the plaintiffs sufficiently -- I would say barely is perhaps a
8 strong term -- but they do make it, they sufficiently allege
9 that Bank of China's banking services were used for violent or
10 life-endangering purposes. As alleged in the complaint, Bank
11 of China executed transfers for known Hamas operatives. They
12 were aware of the Hamas affiliations, and the transfers were
13 necessary for the attack at issue here.

14 Secondly, defendant argues that plaintiffs have not
15 met the general *mens rea* requirement of the ATA or the more
16 demanding scienter requirements of the underlying criminal
17 statutes. Here the Court disagrees. Plaintiffs allege that in
18 April of 2005, Israeli government officials told officials at
19 the PRC that the transfers were being used by Hamas to enhance
20 its ability to plan and carry out terrorist attacks. And I
21 find that that allegation suffices to plead Bank of China's
22 actual knowledge.

23 Finally, with regard to primary liability, the
24 defendant asserts that plaintiffs have not sufficiently alleged
25 that Bank of China's banking services were the proximate cause

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1 of plaintiffs' injuries. And looking now at the ATA's "by
2 reason of" requirement, as set forth in 18 U.S.C. Section
3 2333(a), a plaintiff must show that a defendant's alleged
4 conduct was the proximate cause of the plaintiff's injury.
5 Quoting here from *Rothstein v. UBS AG*, 708 F.3d 82, 89 (2d Cir.
6 2013). And to put that a little bit differently, the alleged
7 violation must have led directly to the plaintiff's injuries;
8 the defendant's acts must be a substantial factor in the
9 sequence of responsible causation; and the plaintiff's injury
10 must be reasonably foreseeable or anticipated as a natural
11 consequence.

12 Here I find that the plaintiffs have sufficiently
13 alleged proximate causation. The amended complaint alleges the
14 following: Number one, beginning in 2003 Bank of China
15 conducted dozens of wire transfers for Hamas, totaling several
16 million dollars; number two, many of these transfers were made
17 to the accounts of Said al-Shurafa, a senior officer and agent
18 of both Hamas and the PIJ; and, three, al-Shurafa then effected
19 these transfers to Hamas leadership for the purpose of
20 planning, preparing for, and executing terrorist attacks;
21 number four, Bank of China's provision of these wire transfers
22 allowed Hamas to carry out the Mercaz Harav attack.
23 Defendant's argument that plaintiffs have not sufficiently tied
24 al-Shurafa to Hamas is unavailing at this stage of the
25 litigation. Again, at this stage plaintiffs have made a

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1 sufficient showing.

2 I turn briefly to secondary liability under JASTA,
3 otherwise known as the Justice Against Terrorism Act, an act in
4 2016, that specifically was engaged or implemented in order to
5 amend the ATA to permit claims for secondary liability for
6 aiding and abetting in a conspiracy. JASTA includes two
7 statutory requirements: Number one, that an act of
8 "international terrorism" be "committed, planned or authorized"
9 by an FTO, and two, that a defendant conspire with the person
10 who committed the act of "international terrorism" or knowingly
11 and substantially aid and abet the act of "international
12 terrorism." And Congress has instructed courts to apply the
13 legal framework set forth in *Halberstam v. Welch*, the D.C.
14 Circuit decision from 1983, to consider aiding and abetting and
15 conspiracy liability. In this regard as well, defendant makes
16 two arguments: First, defendant argues that plaintiffs do not
17 sufficiently allege the *Halberstam* elements of conspiracy --
18 specifically that there was an agreement between Bank of China
19 and Hamas to participate in a terrorist attack and, second,
20 defendant asserts that plaintiffs have failed to allege two
21 elements of aiding and abetting liability: Number one, the
22 awareness and knowledge requirement; and, number two,
23 substantial assistance. But here again plaintiffs' allegation
24 that the Israeli government sent a delegation to China to spell
25 out to China and by extension the Bank of China the

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1 significance of its assistance to Hamas suffices to meet all of
2 these elements at the pleading stage.

3 Therefore, and for all of these reasons, I am
4 dismissing the motion for judgment on the pleadings in its
5 entirety.

6 Now, of course, I want counsel to think about my
7 decision, but it would seem to me that the next step would be
8 the discussion or meeting between the parties to propose a
9 discovery schedule to me.

10 There is a case management plan that I have on my web
11 page that would give suggested dates. I do not know if this is
12 a case in which the parties would prefer a more tailored or
13 more bespoke case management plan that addresses the issues in
14 this case.

15 So, turning to Mr. Gaston, sir, you might need some
16 time to do this. How much time would you like to confer with
17 your adversaries and propose something to me?

18 MR. GASTON: Well, I think we could confer and propose
19 something pretty quickly, but I would also like to mention that
20 we already have discovery requests outstanding, and they have
21 been served on defendant since about six or seven months ago.
22 But as to scheduling and deadlines and so on, I think we do
23 have to discuss that.

24 THE COURT: Well, all right. Then perhaps I should
25 ask the question of your adversary.

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1 Mr. Saperstein, I want you to have the time that you
2 need to speak with your adversaries but, as well, to consider
3 these pending discovery requests that did not need to be
4 answered while this motion was pending. So, how much time
5 would you like to have that opportunity to review those
6 requests, think about the time that is necessary and speak with
7 your adversaries before proposing something to me?

8 MR. SAPERSTEIN: I think in order to respond to their
9 requests, I believe I would have 30 days, and that's what I
10 would request to respond to them.

11 But if I might suggest -- and this is what I will
12 suggest to plaintiffs' counsel -- is that perhaps we do
13 discovery by a staggered process. So, for example, it's clear
14 from your decision that the April 2006 meeting is critical and
15 central to the plaintiffs' allegations, so I would propose that
16 perhaps we focus on whether Israel will agree to make a witness
17 available. Because once we have that answer, we can move into
18 the political question doctrine, to see if it's ripe then, as
19 well as addressing the core allegations of plaintiffs' claim.

20 THE COURT: Let me please do this, because I know
21 already that the parties will not reach agreement on this
22 issue, so I'm going to do something a little bit different.

23 Mr. Gaston, would you be able to provide for me a
24 letter in two week's time, on or before the 23rd of August,
25 outlining how plaintiffs believe discovery should be

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1 structured.

2 MR. GASTON: Yes, certainly.

3 THE COURT: Thank you very much.

4 Mr. Saperstein, would you be able to provide for me a
5 letter on or before August 23, so two weeks from today,
6 regarding how the defense believes discovery should be
7 structured?

8 MR. SAPERSTEIN: Your Honor, if I may ask for an extra
9 week, and it's for a purely selfish reason. I'm slated to be
10 on vacation between the 17th and I believe the 22nd.
11 Obviously, I can work while I'm on vacation, but I would rather
12 not.

13 THE COURT: Yes. Sir, I don't want you to think that
14 I am so cruel that I will make you work on your vacation.
15 You'll come to realize later on how cruel or not I am. So, I
16 will give both of you until the 30th. Certainly, if you turn
17 it in earlier, that's great, but I won't look at it until I
18 have both of them.

19 I'm just going to say this -- and you will do with
20 this whatever you think is appropriate -- you're not going to
21 agree; I can tell that already. But, rather, perhaps --
22 perhaps in your letters to me you might want to present certain
23 fall-back positions. It's fine if you want to -- if you will
24 excuse the baseball metaphor -- you can hit for singles or you
25 can hit for home runs, but if you try to hit for the home run

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1 and strike out, then you may be in a worse position. So,
2 perhaps you want to give me your dream proposal, how discovery
3 would be if you were ruling this courtroom, and then perhaps
4 give me a fallback position so I can see if there is any
5 commonality between the parties. But I do understand both of
6 your positions about discovery, and I'm not surprised by either
7 of them.

8 So, I will hear from you on or before the 30th of
9 August. In the interim, I wish you all a happy rest of your
10 summer, a happy Friday today.

11 I am confident that one or both of you will get the
12 transcript in this case, and when you order it, I will receive
13 it automatically. And I will talk to you in the future.

14 So, Mr. Gaston, is there anything else you want to
15 bring to my attention today?

16 MR. GASTON: No, your Honor.

17 THE COURT: All right. Thank you.

18 And thank you as well to Mr. Scher for sitting in on
19 the call.

20 MR. SCHER: Thank you.

21 THE COURT: Mr. Saperstein, anything else you want to
22 bring to my attention today?

23 MR. SAPERSTEIN: May I just confer with my colleagues
24 just for one second?

25 THE COURT: Of course.

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1 MR. SAPERSTEIN: No, your Honor. Thank you.

2 THE COURT: Mr. Saperstein, to the extent the folks in
3 the room with you assisted you with your written and oral
4 submissions, please thank them on my behalf as well.

5 MR. SAPERSTEIN: Thank you. I will.

6 THE COURT: All right. Thank you. We are adjourned.

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